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ATTORNEY FOR APPELLANT:

**KEVIN WILD**  
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

**STEVE CARTER**  
Attorney General of Indiana

**MATTHEW D. FISHER**  
Deputy Attorney General  
Indianapolis, Indiana

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**IN THE  
COURT OF APPEALS OF INDIANA**

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AMANDA McNEIL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0608-CR-620
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Scott DeVries, Commissioner  
Cause No. 49F09-0506-FD-108560

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**May 10, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**MAY, Judge**

Amanda McNeil challenges her conviction of possession of paraphernalia as a Class D felony.<sup>1</sup> She alleges the evidence was insufficient to demonstrate the crack pipe was hers and she intended to use the pipe to introduce cocaine into her body. She also alleges a “material variance” between the evidence and the crime as charged. As police found a pipe containing burnt residue of cocaine in McNeil’s purse, the evidence is sufficient to support her conviction. A police officer testified a crack pipe is used to enhance the effects of cocaine, but such testimony does not create a material variance with the charging instrument, as the effects could not be “enhanced” unless the pipe was simultaneously used to introduce the cocaine into the body. Accordingly, we affirm.

### **FACTS AND PROCEDURAL HISTORY**

At about 1:30 a.m. on June 24, 2005, a police officer noticed McNeil standing in the middle of the street. McNeil appeared to be pulling down her sports bra to expose herself to passing traffic. Some traffic slowed down as it passed her. One car stopped, McNeil approached the car, and the car sped away when the driver noticed an approaching police car. The officer approached McNeil to investigate and immediately noticed she was intoxicated. She had glassy, bloodshot eyes and slurred speech. She smelled of alcohol. She was so unstable on her feet that she had to lean on the police car. When the officer asked for identification, McNeil could not find it in her purse and handed the purse to the officer. The officer pointed to her identification, but she was still unable to retrieve it. The officer placed McNeil under arrest for public intoxication and

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<sup>1</sup> Ind. Code § 35-48-4-8.3.

public indecency. A search incident to arrest uncovered a crack pipe in McNeil's purse. The pipe tested positive for cocaine residue.

The State charged McNeil with public intoxication as a Class B misdemeanor,<sup>2</sup> possession of paraphernalia as a Class A misdemeanor, and possession of paraphernalia as a Class D felony. The allegation distinguishing the misdemeanor and felony possession of paraphernalia counts is that McNeil had a prior conviction of possession of paraphernalia. Ind. Code § 35-48-4-8.3(b). After a bench trial, the court found McNeil guilty of all three charges, and the court merged the paraphernalia convictions.

### **DISCUSSION AND DECISION**

#### **1. Sufficiency of the Evidence**

McNeil claims the evidence was insufficient to support her conviction. We must affirm her conviction unless no reasonable fact-finder could have found the evidence proved her guilt beyond a reasonable doubt. *Winn v. State*, 748 N.E.2d 352, 357 (Ind. 2001). When making our determination, we must view the evidence and the inferences therefrom in the light most favorable to the verdict, and we may neither reweigh the evidence nor reassess the credibility of the witnesses. *Id.*

To convict McNeil of possession of paraphernalia, the State had to prove she did knowingly or intentionally possess a raw material, instrument, device, or other object, that is: a pipe, that she intended to use for introducing into her body a controlled substance, that is: cocaine, listed on Schedule II of the Indiana Uniform Controlled Substances Act.

(Appellant's App. at 21.)

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<sup>2</sup> Ind. Code § 7.1-5-1-3.

McNeil first asserts the State did not prove the pipe was hers, because someone from the car she approached could have placed it in her purse. We decline her invitation to reweigh the evidence. That the crack pipe was found in McNeil's purse supports an inference the pipe was hers.

As for whether she intended to use the pipe to introduce cocaine into her body, we also find the evidence sufficient. The pipe found in McNeil's purse had cocaine residue in it. Both ends of the pipe were burnt, suggesting the pipe had been used at least twice. This is not, as the trial court noted, a case regarding items that are commonly used to administer legal drugs, such as a syringe; rather, the item at issue was a piece of pipe that had already been used at least twice to smoke cocaine. That evidence supports an inference McNeil intended to use the pipe to smoke cocaine in the future.

## 2. Variance

McNeil next argues the evidence at trial varied materially from the charging information.

To award relief on the basis of a variance between allegations in the charge and the evidence at trial, the variance must be such as to either have misled the defendant in the preparation and maintenance of his defense with resulting harm or prejudice or leave the defendant vulnerable to double jeopardy in a future criminal proceeding covering the same event, facts, and evidence.

*Winn*, 748 N.E.2d at 356.

The State charged McNeil under Ind. Code § 35-48-4-8.3, which provides:

- (a) A person who possesses a raw material, an instrument, a device, or other object that the person intends to use for:
  - (1) introducing into the person's body a controlled substance;
  - (2) testing the strength, effectiveness, or purity of a controlled

substance; or  
(3) enhancing the effect of a controlled substance;  
in violation of this chapter commits a Class A infraction for possessing  
paraphernalia.

The Information alleged McNeil violated subsection (a)(1) by possessing an “instrument, device, or other object, that is: a pipe, that she intended to use for introducing into her body a controlled substance, that is: cocaine.” (Appellant’s App. at 21.)

At trial, the arresting officer testified a crack pipe is “used for enhancing the effects of cocaine.” (Tr. at 21.) McNeil asserts that testimony created a material variance between the charging information and the evidence presented at trial because it supports a conviction under subsection (a)(3). We disagree.

While the officer’s testimony relates to subsection (a)(3), it is not inconsistent with the charged subsection of the statute. When a person smokes cocaine in a crack pipe to enhance the effect, he or she is simultaneously “introducing into her body” that controlled substance. Accordingly, in this context, these two subsections of the statute are not mutually exclusive.

McNeil claims the variance was prejudicial to her preparation of a defense and leaves her vulnerable to double jeopardy, but she does not provide explanation about either. She has therefore waived that allegation of error. Waiver notwithstanding, her claims fail.

Her defense was not prejudiced. At trial, she argued the crack pipe was not hers and the State did not prove she intended to use the pipe to smoke cocaine. Neither defense depended on the subsection charged.

Nor is she vulnerable to double jeopardy, as the State could not charge McNeil again for possession of the same crack pipe. *See, e.g., Richardson v. State*, 717 N.E.2d 32, 52-53 (Ind. 1999) (discussing actual evidence test under Indiana double jeopardy jurisprudence).

For these reasons, we affirm.

Affirmed.

NAJAM, J., and MATHIAS, J., concur.